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SESSION 3

RENEWABLES, REGULATION AND RISK: THE NEW FRONT LINE OF ENERGY ARBITRATION

SPEAKERS:

MODERATOR: VISHROV MUKERJEE, PARTNER, TRILEGAL

BITIKA KAUR, HEAD – LITIGATION, REAL ESTATE & REGULATORY PRACTICE, APRAAVA ENERGY

MAHESH VIPRADAS, VICE PRESIDENT REGULATORY & POWER MARKETS, SEMBCORP

NAMRATA ARORA, GENERAL COUNSEL & CHIEF ETHICS OFFICER, BLUPINE ENERGY

SUNEI KAPUR, CHIEF BUSINESS OFFICER, RESOLVEN

ANUSHKA MANSHARAMANI: I request everyone to kindly be seated. We will begin in the next five minutes. Thank you. We shall now begin with our next session for the day hosted by Trilegal. The global shift towards renewable energy has brought with it a distinct set of regulatory and commercial challenges, from evolving policy frameworks to the risk inherent in long term Power Purchase Agreements and cross-border project financing. As the Energy sector undergoes this transformation, disputes arising from it are emerging as a significant new area of focus for arbitration practitioners. This is precisely the terrain our next session is exploring, which is titled as "Renewables, Regulation and Risk: The New Front Line of Energy Arbitration". The session will be moderated by Vishrov Mukerjee. He will be joined by Bitika Kaur, Mahesh Vipradas, Namrata Arora and Sunei Kapur. I would now request everyone to welcome our Moderator and panellists on the stage.

VISHROV MUKERJEE: Hi, good afternoon, everyone, and a big thank you to MCIA for organising this. It's quite a turnout given the rigorous traffic restrictions that are going on. So, thank you to everyone in the audience who's taken time out to attend this particular panel. I'll just take a few minutes to quickly introduce our panel. We have a mix of legal, business and regulatory folks with us here today. We have Sunei who is who is the Chief Business Officer at Resolven which is a clean energy platform. Sunei by background is a lawyer who has transitioned to the business side in the renewables sector. We have Mahesh who is the Vice President for Regulatory and Power Markets at Sembcorp, India. And in his position, he actually straddles both business and regulatory, given the enmeshed nature of regulatory and legal in the renewable sector in India. We have Namrata Arora, who is the General Counsel and Chief Ethics Officer at BluPine Energy where she's heading legal strategy, governance and ethical decision making for a renewable energy business. And we have Bitika Kaur who is the Head of Litigation real estate and regulatory practice at Apraava, which is again an Indian energy solutions provider having a significant renewable energy footprint in the country. Thank you, all of you for taking time out today.

Let me set the context for why we are having this conversation now. In 2003, when the Electricity Act was enacted, India's power sector was still overwhelmingly conventional. Coal and large hydro dominated the energy mix in the country. And 2003 actually saw a lot of regulatory institutions, including Electricity Regulatory Commissions and the Appellate Tribunal being created, that was really the start point of the regulatory landscape as far as the power sector in the country is concerned. But over time this, you know, this picture has been transformed. Today, India's installed renewable energy capacity has grown from approximately 76GW in 2014 to about 289GW today. That is a four-fold increase in just over a decade, with solar, you know, being the largest component. And with this change in the energy mix in the country, there has been a decisive shift in terms of who builds, who operates this capacity. And what was once the domain of mainly state utilities is now largely, private ownership driven. So, you have a lot of Indian promoters, you have a lot of investment platforms, you have a lot of foreign sponsors who are now present in the power sector. And naturally, the disputes of the... the kind of disputes that the sector sees has also undergone a change. In the early 2000s, the disputes were largely about tariff determination, about licensing; now the disputes are primarily around change in law, GST, safeguard duty, ALMM curtailment, evacuation risk, DISCOM defaults. And along with that, the gestation period for these projects has also shrunk from the 5, 6, 7-year gestation period for thermal projects to a 16-18 month gestation period for a renewable energy project means that the project timeline is shorter, there is lesser scope to account for disruption and delays in the sector.

And this shift has resulted in seeing that traditional forums are visibly strained. In fact, as of mid-2025, the Appellate forum has had approximately 2600 matters pending with about 1700 of them having been pending for over three years. The pendency has actually, in the Appellate forum, has actually gone up by about 70%. Now against this backdrop of an explosive sectoral growth, deepening private participation and a Dispute Resolution architecture which has been unable to keep up with the kind of disputes and the volume of disputes that are coming up, we are going to look at whether arbitration can solve some of these problems, and if so, how? So, with that context, I want to, you know, come to our panellists and get their initial thoughts, at least, on how they view the sector and some of the issues that they view the sector as facing before we sort, of drill down into arbitration and the renewable energy sector. So, I'd like to start, you know, from the far left. So, if we can start with Sunei and then just move down, just give your views, quick views on the sector and the problems that you that you currently see.

SUNEI KAPUR: Sure. Thanks. I think the issues remain the same as they have over the last 5-10 years. The industry has grown, the nature of disputes has become more complex, but I think the regulator on the adjudicatory side hasn't been strengthened the way it should have been. The time it takes to resolve issues is fairly long. We've been advocating for a larger number of benches for CRC, we've been advocating for a more structured way to work on policy matters. But unfortunately, that is yet to take any shape, or really, you know, no positive steps on that side. Whether arbitration can help? Definitely. I think it's time and the PPAs and bidding documents have evolved to a level where clear distinguish... there's clear distinguishing factors between purely commercial contractual disputes and regulatory disputes. So, framework where purely contractual disputes not impacting regulations at large, that can be referred to arbitration. I think that is the need of the hour and that should be done. As we speak about it in detail, we can discuss specific issues that require that attention.

VISHROV MUKERJEE: Thank you. Namrata?

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NAMRATA ARORA: Hi, good afternoon. So, I think, look it is not so straightforward, how I would look at it you know. If arbitration is the alternative of taking away the disputes from the regulatory forums and putting it to an Arbitrator, before an Arbitrator. I think, how yes, I understand that, you know, the speed at which these issues should have been resolved before the regulatory forums, you know, it is unfortunately, not happening, while you know, there is a dedicated commissions that have been set up under the Act, and the whole idea was to move things faster. But I think before I apply this principle, you know, for me it is important is, what is the nature of dispute? Who are the Parties that are we are dealing with? And what is the relief that we are looking at? I think these are the... some broader principles that come to my mind before we can sort of conclude that, you know, arbitration is the next best alternative of moving, you know, moving the electricity and the regulatory disputes from commissions for an arbitration.

VISHROV MUKERJEE: Thank you. Mahesh?

MAHESH VIPRADAS: Thank you. I think, if you look at the disputes which are currently there in CRC or in Appellate Tribunal, I think 80% or 75% of them are basically related to the regulations of those, and I would say, there are two, three major areas which we are facing, most of the most of the disputes. One is transmission access and related issues; the second is a change in law. So, change in law, to some extent we can look at the alternative methods, but as far as the disputes which are mostly regulation related, there I'm not too sure. And that is also because the regulation itself is not stable. I mean, within the last two years we have seen four amendments into the transmission regulation; so, keeping pace with that is also an issue.

VISHROV MUKERJEE: Thank you. Bitika?

BITIKA KAUR: Taking up from what Mahesh said, there is already a lot of regulatory overlap and gaps in the framework itself, so currently disputes are arising on those areas more than the contractual aspect of it and at this stage to completely transfer matters to arbitration or initiate an alternate dispute may not be the correct approach because when you look at it from the perspective and the continuity perspective, a regulator giving you that order stands much stronger as opposed to an Arbitral Tribunal giving the same order. So, at this stage maybe it is a push too soon to completely transfer it to a dispute resolution... to an Alternative Dispute Resolution forum. And the matters that are before the Commission today would require their oversight under the Act and under the regulations.

VISHROV MUKERJEE: Thank you. Thank you. You know, just sort of, taking a cue from what all of you have said, from a strategy perspective, being aware of the limitations of the system and of the current dispute resolution system and the kind of time that these disputes are taking, you know, I'd just like to have, you know, maybe one business perspective and one legal in terms of how this sort of dovetails into the legal strategy that is being developed. And you know, Bitika, maybe if you can just come in first, maybe from a legal perspective and then we can go to perhaps, you know, Sunei on the on the business side of things.

BITIKA KAUR: I think largely whenever a dispute is arising, there are two perspectives that we're always considering, be it legal or business. One is of course how your shareholders, your investors are going to look at the matter and consider it as a risk. And the second is from the lender perspective because you want to keep the funding going. Once they are on board and you give them a clear understanding, which also includes the time it is going to take for these matters to resolve, I think by and large the legal strategy then easily flows from there. So, for me, I think when I do navigate these kind of matters, the upfront steps we do take is the inputs we take from law firms about how these matters are going to translate, the kind of merits that we have, and then the potential impact mostly on the positive side about how it works for us if we do take it forward. And more often than not, they do take into consideration the long durations that's going to take for the resolution. Having said that, of course, luckily for me, I've had a good experience with commissions where matters are closed within a year's time, and because of the relation with our procurers we are able to come at a good solution which gives the investors also that much confidence that yes, going to the Commission and dispute resolution is much better than going down an additional path. So, legally for me, I think that's how we've tackled it so far and hopefully we'll continue doing it that way.

VISHROV MUKERJEE: Thank you. thank you. And Sunei, can we have your thoughts on it because you've you know, you've actually worn both hats, you know, just your thoughts on what goes in as an input maybe from the legal side or from the business side at the start of this dispute?

SUNEI KAPUR: Yeah. So, I think the way the in-house structures function, it won't be correct to look at it when the dispute starts. The work that the in-house team does is... actually 80% of it is much before it's pre-emptive. I think there is a constant communication between business and legal to make sure that the dispute never comes up, one. A lot of work goes into that, a lot of and it's not just analysing what the law says, it's, you know, making sure that the contracts captured it properly, and more importantly, ensuring that all the communications after the contracts are done or the work has started is maintained along with the legal team to, you know, sort of prepare for a potential dispute at some point. Disputes taking 12 months could be lethal for from a business perspective, I think. From a lawyer's lens, I completely understand and appreciate that that sounds okay, but that could completely paralyse a project and you know, that's not an outcome we want. So, we would want to avoid litigation at all expense as much as we can. So, mostly you'll see that responsible companies are taking very few matters to court. It's not, you take... going to the commission at the drop of the hat, and you're going only when you have the confidence and your investors have the confidence that the outcome is going to be positive. That's about it, I think. That's...

VISHROV MUKERJEE: Thank you. Thank you for that. And you know, on that note, you know, one of the of course, there is a there is an infrastructure issue and an expertise issue in terms of why these commissions and the Tribunals are taking time, and then we also have a problem of multiplicity of fora because you have the Central Commission and the State Commission which are basically equal, and at times you have differing judgements and decisions coming in from the Central Commission and the State Commission, and for that matter the Appellate Tribunal as well. In fact, recently, the Appellate Tribunal has disagreed with its own view that it has taken, you know, about six, eight months back, it's now referred the matter to the... it's now referred the matter to the to a full bench, not only causing a delay in the existing matter, but also, you know, resulting in a cloud over the matter that they had decided earlier. In this context, you know, very often we see clients preferring to go to the, you know, down the High Court route rather than, you know, rather than the Commission route. And given that we are looking at... Of course, we are looking at arbitration, but we're also looking at alternate means of dispute resolution, you know, perhaps you know, I'd like Namrata to come in here that when you are deciding on the forum, you know, what are the, key criteria or conditions that you're looking at when you're deciding that? And is there a general preference according to you for, you know, let's say going to a High Court and getting a broader brush relief than actually going to the regulator?

NAMRATA ARORA: So, like I said that, you know, I think for me it is important is to understand what is the nature of dispute that we are addressing, right? Is it primarily linked to a, you know, a regulatory issue, right? And like Mahesh said that, you know, most of the disputes that are stranded or stuck before various forums are around, you know, the regulations, right? And also, who are the Parties and what is the nature of relief that I'm seeking, right? Because you know, the Act clearly captures the jurisdiction of the Commissions, like what is the nature of disputes that they can adjudicate upon. But yes, you know, for us also and being an in-house Counsel, I can say that there have been situations where, you know, there is an imminent threat on an invocation of a Bank Guarantee, or there is an imminent threat on, you know, a revocation, right? At that point in time, you know, given the strength of the Commissions, and given the time it is going to take for that matter to come up and for us to get the relief that we require, which is the need of the hour, we've also invoked jurisdiction of the High Court.

So, again, I don't think that there is a straight principle that we can apply; it is more dependent on the facts and what is that we are looking to address, you know, what is the problem that we are looking to address. Yes, you know, if like, you know, given the sector, there is a whole gamut of contracts that we deal with on a daily basis, you know, to link with land, connectivity, transmission, PPA or EPC, but if we were to sort of completely talk about a technical or a commercial dispute, yes, you know, even those contracts clearly stipulate as arbitration as the dispute resolution mechanism. So, I don't think, you know, it would be appropriate to sort of set any, you know, a broader principle right now, while I think the broader principle is still there that, you know, given that if it's a regulatory issue, we would want to invoke the jurisdiction of the commission only. But I think the unfortunate part is the time that it is taking for us to get the necessary relief. I think that's where we have to now put our thinking cap and see that, you know, if arbitration could be a better option.

VISHROV MUKERJEE: Thank you. Thank you for that. And actually that brings me to, you know, closing the loop with Mahesh. Mahesh, from a regulatory affairs lens, what would you... what do you think is the single biggest structural roadblock today, you know, in terms of either jurisdictional overlap or multiplicity or just the institutional capacity, or you know, maybe it is something entirely different? So, I think from... just from your regulatory perspective, what would you... what would you think?

MAHESH VIPRADAS: I think we have quite a bit of clarity on jurisdictions. The call, as has been mentioned to approach one or the other forum is very small cases, I think not more than 20% of the cases where this question arises, and the answer comes from where we get the fastest relief. But on the second part, on the institutional capacity, I think there is a lot to be done. If you compare, and I will just compare the regulatory commissions including CRC and the Appellate Tribunal. Now if you see the Commissions, they have the capability and resources and the staff available specifically, for example, engineering, regulatory finance that staff is available with the Commission because they are also in the process... in the business of making regulations and that. But when it comes to the Appellate Tribunal there, I think a lot of strengthening may be required because as per my limitation, limited understanding there is no dedicated expertise there to look at these. And especially in case of renewables, those are mainly heavily technical disputes which are coming up. So, I think that's an area where maybe some efforts would result into a faster dispute resolution.

VISHROV MUKERJEE: Thank you. Thank you for that. You know, which brings us to the arbitration part of this discussion. And I think a larger overarching question that is there is that, does this panel feel that arbitration can remove or dispel the state bias that the regulator

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is operating on? So, you know... if I can just have, Bitika, if I can just have your thoughts on do you think that moving to arbitration *vis a vis* the regulator can actually address that issue?

BITIKA KAUR: I think it's not just about dealing with the capacity like currently because of the strength of the Commissions and the biasness that could be an issue; it's also the expertise and the nature of the matter that we have to consider here. So, as an alternate resolution, maybe arbitration would not be the best strategy moving forward. But other aspects like maybe a technical body assigned to assist them to understand certain matters, increasing their capacity size, other panels being in place so that the assistance is available for the Commissions to determine these matters in a faster way. The kind of support that Mahesh was also mentioning that's currently not available for APTEL. I think as a starting mechanism, that would be something that should be focused on. Also in any sort of alternate strategy that we're looking at here, we must see who the counterparty in this matter is. So specifically, when your disputes are arising with DISCOMs or with Public Sector Utilities, the order coming from a Commission *vis a vis* a Tribunal will have a very different impact here. And the kind of security and certainty that is required will come today only from a regulated body which is with the commissions. So, the better alternate would be to strengthen them in a capacity that can speed up the process, also help them with the technical expertise, bridge the gap that we see in the frameworks as opposed to looking at a completely new modality. Of course arbitration works when you're looking at purely commercial disputes because there the expertise is not such a relevant and then again, the support comes in from the pleadings and the documents that are already on record. But if you're looking at a purely regulatory dispute, I think we should focus more on building the capacity and strength of the Commissions as opposed to looking at a different forum altogether.

VISHROV MUKERJEE: And Sunei, you think that, you know, bringing in arbitration can dispel that state bias and make life easier for everyone across the board?

SUNEI KAPUR: No, I don't think we can. We won't be able to take the regulatory matters. Let's be clear that the Commission will continue to remain the gatekeeper of the regulations. We have to understand that a regulatory dispute also is not fought only before the commission. And you know, Mahesh can talk about this endlessly. Over the last 10- 15 years, there is so much stakeholder engagement that's required to get to, you know, a rational outcome of a regulation or a regulatory dispute. It's not simply that you go to a regulator and the regulator, like three people sitting there hear you out and decide what needs to be done. There's interface between different Ministries, different Departments, the industry bodies who very actively work along with the Ministries to find, you know, how the regulation should proceed and you know, how the policy must progress. So, I think all of us will be, I'm sure we are aligned that regulatory matters definitely cannot go, have to remain with the Commissions despite the biases or despite the inefficiencies of the Commission.

But where we stand today is... like, the need of the hour is that the Commissions are afforded more and more time to focus on these issues. So, purely contractual issues or financial issues, issues like change in law, for example, required, like, I saw Commissions getting into questions of how GST is implemented, what is the... whether the tax is appropriate or not, whether the assumptions are appropriate. For a certain period of time, they were actually looking into documents to verify whether documents are okay. That is not the job of the Commission. So, yeah, we need to make it more efficient. We need to take away non-regulatory matters. I don't know how to define it really, but matters which are purely contractual, commercial outside their scope, and let the Commissions focus on the most important thing that is you know regulatory development.

VISHROV MUKERJEE: Thanks. Thank you for that. And Namrata, just you know one question to you, from a General Counsel's perspective, you know, between you would have seen arbitration disputes, you would have seen regulatory disputes, which one do you find is faster, more predictable, or for that matter even, you know, more efficient? And what are some of perhaps, you know, what are some of the practices from arbitration that we can sort of bring in even before the Commission in those matters that the Commission is deciding?

NAMRATA ARORA: So, yeah, of course, you know, I've had seen both commercial disputes before an Arbitrator and the regulatory disputes for which we go to the regulatory forums. So, honestly, I think like Bitika said, even our experience has been so far well on the regulatory side, you know. We've been sort of lucky to have our matter closed maybe in a year's time, which I still believe is, sort of, quite a long window. Because as you just said that, you know, for renewable energy projects, the overall, you know, commissioning timelines have got crunched, right? So, for that also, you know, having... taking one year for a for a dispute to get resolved, and I mean, of course, to get resolved it impacts business, you know, and it impacts your operation, your certain timelines on the project execution site could go haywire. But I mean, on the... again, I think on the arbitration side also, it is equally long. It has not been so straightforward that, you know, I think when arbitration came in, I think the whole vision was that we are getting into a Dispute Resolution mechanism which will be much faster than the courts. But I think, of course, in my experience what I've seen is that any commercial dispute, maybe with your EPC vendor or your O&M vendor, it has equally taken maybe one... more than one year for sure. So, I think in term of what is the good part that we can borrow from the arbitration and apply to the regulatory disputes could be, maybe, you know, we could sort of structure the Dispute Resolution clauses in our PPAs, you know, in a better manner. We can

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sort of, define proper timelines within how much time one has to approach the Commission, within how much time the Commission should adjudicate upon that matter. And maybe, you know, some broader principles can be... While I know that, you know, everything is going to be around by way of a jurisprudence, but you know, if some inherent principles can be documented, I think that would give more learning curve to the Commissions that they don't have to delve on each and every issue. You can define the nature of supporting documents that you want to look at, on a broader way, you can structure the clauses better, you can define the timelines. So, I think if the procedure can be formalised and structured, I think we can still see that, you know, there'll be a big improvement. And of course, there is a need to strengthen the you know, the forum. There should be multiple bench, given that, you know, now renewable energy industry has matured so much, and the nature of disputes that are happening are significant, and of course, all high value.

VISHROV MUKERJEE: So, it's interesting that you've mentioned drafting better clauses, because this is... this has been one of the bugbears of the sector. You have agreements which have Arbitration Clauses for non-tariff and non-regulatory disputes, but despite that, I don't think even 0.5% of the disputes are actually going for arbitration, notwithstanding the fact that they are... that there are a lot of non-tariff disputes. And you know, in terms of this and you know, Sunei and Mahesh, I'd like your views on this, that this tariff non-tariff divide is there. As renewable developers, I think the line is very clear in your mind in terms of what ordinarily falls within tariff and non-tariff. As lawyers, it is very clear to us what falls within tariff and non-tariff. But unfortunately, despite this divide, we see increasingly the Commissions wanting to sort of, usurp or retain their jurisdiction and we see the distribution companies not wanting to undergo arbitration because, it is in that sense, a private adjudicatory process rather than a public adjudicatory process. And in this context, you know, I always, as a measure of what constitutes tariff and non-tariff, I give this example that you can understand tariff colloquially to mean the money that is coming to you, or you can understand tariff contractually as, you know, one single number that is actually mentioned in the PPA as a per unit cost of power. So, in terms of you know, in terms of this divide and this, sort of, grey area that has unfortunately, crept in, your views on what you think will definitely fall under the non-tariff bucket? And if there is an Arbitration Clause, the Commission should, you know, take a hands-off approach and say that please go for arbitration because we have actually approved the arbitration clause when we've approved the PPA. So, either of you. Mahesh maybe you can take it first and then Sunei can come in.

MAHESH VIPRADAS: I think that would help to a certain extent. Maybe having a clear contours drawn around the tariff part of it. Now just since we are mentioning, would we consider the GST change in law? It does make a difference but then the way it has been treated, it's becomes an annuity and comes back to you. So, maybe there are areas where we can we can look at it. The second part is then there is always there is a provision that the Commissions can always refer it to the to the arbitration. I think clear guidelines there rather than leaving it to the Parties; to have a clear guidance in these situations, the Commission should get it directed to the arbitration, I think that would help, rather than... because the DISCOMs which are normally the counterparties, their natural preference is the State or the Regulatory Commissions because they are they are quite comfortable with working with those Commissions.

VISHROV MUKERJEE: Okay. Sunei, your thoughts on this.

SUNEI KAPUR: Yeah. So, taking what the State DISCOMs are comfortable at first, and I think that's an issue with all government, sort of, departments. I think the scrutiny at their end is so high that they're not comfortable, like, there are multiple instances where they would understand what you're saying they like they we are aligned, but their hands are sort of tied because of, you know, the processes and the audit trail that they have to create. I think we need to do better to sort of, you know, encourage them accepting commercial dispute resolution mechanisms. While we were internally discussing, you know, what to say here yesterday, we remember that there was actually a notification that the Central Government issued saying that we will not take arbitration for any matter above 10 crores or something. I think when the government itself is, you know, discouraging, and 10 crores is not a big number for the kind of disputes we have. So, I think that is a larger issue that sort of needs to be looked at the government level in terms of how they accept it.

And on tariff and non-tariff, I think this is something that is... Maybe a better way would be to look at it between contractual and regulatory. I'm saying if a contract has been approved by the Commission and the question is purely on enforcement of that contract, then I don't see how whether the Commission sits on it or an arbitration panel that is, you know, fit to look at it, how they'll reach a different conclusion. If the problem is that any impact on tariff or any outlay of money from a DISCOM or a transmission licensee has to be approved by the Commission, then it can be a simple adoption process. But I don't see any merit in the Commission sitting on purely contractual disputes for 12 months, 8 months and, you know, really devoting that much time and taking it away from regulatory and policy matters. So, I again, this tariff non-tariff discussion yeah, I know it's been started because of a few matters and few, you know, judgements, but we need to relook at it in a more... with a more open mind.

VISHROV MUKERJEE: Thank you. Thanks, thanks for that. And Bitika, I just want to come to you. We've been talking about the first level of the dispute which is before the Commission. But if you look at it from an Appellate perspective, of course, orders of the Commission are

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challenged before the Appellate forum. If you have an arbitration, then you go down the 34, 37 route. And these are materially different in the sense that, you know, one is a first appeal, one has limited specified grounds on which the award can be set aside and, you know, do you feel that that going down the arbitration route will… could result in certain efficiencies coming in at the Appellate stage given the current state of, you know, how the Appellate forum is functioning and the kind of delays that we are seeing at the Appellate forum?

BITIKA KAUR: To be fair, I think, be it a 34 route or be it an Appellate route, the appeal jurisdiction is irrespective limited, and it is up to the Tribunal as well as the High Court as to how expeditiously they would want to close these matters. And of late I feel APTEL has been making a push to expedite the hearings. So, if it is purely just on the timelines, I would still stick to the Appellate Tribunal route as opposed to invoking or trying to go down the 34 route and at the end of it, yes, it's up to the DISCOM how much they want to pursue the matter or the counterparty, but going by the technicalities of the matter. But again, the nature of the disputes we are fighting, I would still go by a traditional route which is already envisaged in the PPA, than to look at an alternate aspect.

VISHROV MUKERJEE: Thank you. Thank you for that. Again, this brings me to, you know, a new development. We all know that the Mediation Act is kicking in. We now have the Appellate Tribunal issuing a notification asking for views from the public on applying this Act and applying Mediation to power sector disputes. I'd just like the thoughts of the panel very quickly on that. Keeping in view the aspect that yes, there are certain challenges where regulatory disputes or transmission-related disputes are concerned, but where we are dealing with issues like Liquidated Damages or where PPA termination, non-payment of bills, late payment surcharge, so, those kind of issues, do you think that Mediation can be a successful via media? And if so, you know, just your quick thoughts on you know, how do you think, you know, maybe one way in which it can be successfully sort of, rolled out or deployed in the sector? We can start with Bitika and then just move down.

BITIKA KAUR: I think it's definitely a step in the right direction. As a precursor to any dispute or approaching the commission, a Mediation meetings between Parties is always helpful. In fact, CTOIL has recently started hearings via a committee on the Change in Law and FM claims, so it does give you an understanding as to what are the kind of challenges the counterparty is facing here. And basis that it does help you to determine what your legal strategy should be and how to tackle these matters going forward. So definitely today Mediation is the correct step in the right direction. But then again, when you're looking at a dispute with a DISCOM, you need to understand what is it really that they're trying to secure here. And that has to be inbuilt into the Mediation Act. As Sunei said, the kind of scrutiny they

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are under is unfortunate, but they do need that kind of support to ensure that things move progressively better and they are able to take independent calls. So, till the time that factor is addressed we can try alternate routes for sure. But ultimately we'll still come back before a Commission or a adjudicatory authority. So, it's just that much time again going down which is not serving either Party. So, until the time this lag is filled, we may not see any benefit coming out of this, but it's definitely a step forward.

VISHROV MUKERJEE: Thank you. Thank you. Mahesh?

MAHESH VIPRADAS: I think for the disputes which are non-related to the regulations, for example, the long pending bills, I think there it could be helpful to have this kind of an intervention. My only... And I have not studied it in detail, but my only worry is the seriousness from the counterparty which is primarily a DISCOM. If that is there, I think that would be a very good initiative for us, especially on the payments issue or the long pending payments issue.

VISHROV MUKERJEE: Namrata?

NAMRATA ARORA: So, I think, look, while Mediation could be formally introduced as one layer before we trigger the dispute resolution, but I still feel that a lot of dialogue exchange already happens before an issue blowouts and it becomes a dispute. I think it could be a good initiative, but I think the only challenges that it could be is that in a lot of time we'll be sort of dealing with the government counterparty, which could be a DISCOM or it could be, you know, SJVN or a SECI or an NVVN, right? I'm not really sure that how much we would have a leverage on them by way of a Mediation, I mean, will there be any sort of a decision making that can happen by way of a Mediation. So, it should not be the case that with that Mediation we are adding additional layer before we actually go in for a dispute resolution, and we would have got the necessary relief because I think we all need to understand that time is of the essence in all these matters. So, I feel that, I mean formally we can introduce, but before any issue becomes a dispute there is already a lot of communication, email exchanges, you know, visiting, making them understand our case; that already happens. So, being these government bodies, I'm not really sure how much they would have in their control to sort of take a decision on that matter.

VISHROV MUKERJEE: Thanks. Sunei?

SUNEI KAPUR: Yeah, I think, I completely agree with Bitika and Namrata, that one, their ability to accept an award of Mediation or anything, I don't see that happening effectively. And... But very interestingly, there is the DRC mechanism which is nothing but sort of, Mediation. So, when I say that the in-house teams, the bulk of the work is pre-emptive and

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you know, a lot of communication between the counterparties, that is nothing but, sort of a precursor to Mediation where we constantly keep explaining our steps and they keep asking us for documents. So, we... mostly we find ourselves in a stage where they're fully aware of the actions that have been taken and the reasons. We are aware of the decisions they are taking. But if a Mediation could happen under, sort of, authority of the Commission, in DRC under the authority of the Ministry, that could be effective. But to simply put it under the Mediation Act, under independent sort of Mediation mechanism, unless these deeper problems of the state authorities having a commercial bent of mind, being incentivised to find solutions and moving on, them really realising the amount of state money that goes into these litigations, I think unless that changes, I don't see Mediation being very effective.

VISHROV MUKERJEE: And that is an interesting observation. In fact, that actually brings me to what is the last question to the panel before we open it up to the audience, is that if you could change one thing in either the Electricity Act or the standard bidding documents or arbitration for that matter to make arbitration a genuinely credible alternative for the power sector disputes, what would it be and why? We can, Sunei, we can just start with Sunei.

SUNEI KAPUR: Sure. Very simply, I think like we said, that the contracts need strengthening they definitely do they I think they're not they're all over the place. They've changed so many times. I think it needs a relook at the provisions and how they're structured. The PPA and the PSAs itself could very simply demarcate what are the issues that go to arbitration. Like *force majeure* change in law, I don't see merit in the commission sitting on these matters. Some purely contractual matters could very simply be stated that these will go to arbitration. We can state how the... Anyway, CRC is selecting the Tribunal; so, they know whom to select and what kind of experience is required. I think that is the simplest and the most urgent change we could do.

VISHROV MUKERJEE: Namrata?

NAMRATA ARORA: Yeah, I think I agree with Sunei. I think in the contractual documents, if we can bring in more clarity as to what sort of matters will necessarily be adjudicated by the Commission and what can go for an arbitration, say, for instance, if something is specifically pertaining to an interpretation of an agreement and then, that where we want an arbitration to step in. And like Sunei said that if it's a *force majeure* issue or a change in law issue or a tariff related issue, you know, that continue to vest with Commission; if we can bring in that clarity in the document itself, I think that could be a stepping stone to, you know, make things smoother.

MAHESH VIPRADAS: Yeah, I will... See, the objective is basically to get a speedier resolution. So, I would think that the change that is required in the Act is to allow APTEL to have regional benches or benches at various places; so, that could help. And to some extent at the level of CRC as well because the volume of cases that CRC is now dealing with is going to explode further. So, I think this is the one that that I would recommend.

VISHROV MUKERJEE: Bitika?

BITIKA KAUR: Besides, of course, better drafting. I think one issue that seems to always come is how the regulations tend to get adopted in our standard bidding guidelines and PPAs. So, that lag unfortunately, still seems to be a concern. So, that would be one thing I think I'll move towards, that there should be a better and a holistic approach of the regulations *vis a vis* the contracts so that there's smoother implementation for all Parties.

VISHROV MUKERJEE: Thank you. Thank you for that. You know, I'm just going to summarise and give my views. The topic is "Renewables, Regulation and Risk: The New Front Line of Energy Arbitration". It is a fact that the energy sector itself is undergoing transformation from a conventional to renewables. And to be fair, the dispute resolution within the sector is also undergoing a similar transformation. Till about two years back, arbitration was literally unheard of. We had a total of three arbitrations since 2003 in the power sector, which involved the DISCOM on one side and the power producer on the other. In the last one year there are at least eight such instances where generating companies have gone and are seeking arbitration.

So, while I think we are a bit removed from the frontline of arbitration, but there is a change that is coming about in how power sector disputes and renewable disputes are being dealt with today in the country. And we hope to see at least, the unregulated or the non-regulated part of the disputes which are purely commercial go in for arbitration in line with, and in the spirit of the Arbitration Agreement that most of the standard bidding documents have. This, to my mind, will definitely help address some of the institutional challenges that we are facing in terms of capacity inadequacy and in certain instances, institutional or knowledge inadequacy because you don't have too many trained legal personnel that are deployed, especially at the regulatory commission level. So, this is the state of the nation in terms of energy arbitration in the country today.

I'm now opening the floor up to the audience. If you have any questions for any of the panellists, or if you want to share your views on any of the issues that have been dealt with, or you feel that there are certain inputs that we can take back on how arbitration can be implemented in this sector, happy to hear your thoughts or your questions on it.

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ABHISHEK KUMAR: Hi, I'm Abhishek Kumar. Just because I was hearing this interesting discussion, arbitration versus the powers of regulators, I just want to share one small instance and then I want to understand whether arbitration would be a better option or not. There was one matter which I was doing for a power producer. The government issued a notification, some rate was notified, it was provided, it was passed under the emergency powers of the government. Now obviously, the power producer has no other option but to start producing. They challenged the rate before the Regulatory Commission, Regulatory Commission fixes, I mean dismisses the petition. Then an appeal was filed. Now the Appellate Tribunal, instead of determining the rate, it sent the matter back to the Regulatory Commission. Regulatory Commission decides something; that was challenged further in appeal. Appellate Tribunal again modifies it. Now this whole process, it took roughly 8 to 10 years, and we must keep in mind that the commercials are involved. Under these circumstances, don't you think that arbitration, where people are chosen by you, the adjudicators are chosen by you, they can be a better option to deal with this situation where the whole process of determination may not go more than two years, maximum, which is the time prescribed under the Act? And the scrutiny is also quite less at the, you know, the 34 level or Section 37 level. And in a given... And in today's scenario where more than 80% awards are not being set aside by the courts. So, I just want to understand any of the panellists if...

VISHROV MUKERJEE: On a lighter note, that's how lawyers make money. But you know, just, I'm sorry they're all clients; so, no, that's not how lawyers make money. But, you know, just any one of you in the panel, if you can just, you know, share your thoughts on the gentleman's question.

SUNEI KAPUR: Yeah, no, yeah, that's the state of affairs. We can't take matters away from the Commission, unfortunately because, so long as the regulations and regulatory matters are concerned. That is how the entire energy ecosystem is built, you know. What you're seeking... I completely understand the pain with respect to, you know, CRC APTEL, CRC High Court, we've seen multiple matters being sort of going on for, you know, a decade. But a *simplicitor* arbitration, we're not ready for that. The ecosystem is not ready for that. It'll have to evolve step-by-step and perhaps it starts by offloading some matters to commercial arbitration and then we see how it progresses.

VISHROV MUKERJEE: And also, you know, this is points to an issue that Mahesh identified, that if you strengthen the Appellate forum to carry out these adjudications in terms of computation, calculation, you won't have as many remands. The problem is... of this remand jurisprudence, and this is not a power sector specific issue; it's an Indian judicial system related issue. We've now had the Supreme Court delivering two recent judgements on why you should not remand matters and you should decide matters. But unfortunately, the Appellate Tribunal does not have the wherewithal to carry out this process; so, they have to send it back, which then adds, you know, another layer of dispute, because they will then have to eventually come back to the Appellate forum again. So, I think that structural change and strengthening needs to be there. It will not shave off too many years, but instead of, you know, 6 or 8 years, it may take 4 or 5 years; so, that, you know, that's an aspect. Yes.

AUDIENCE 2: Am I audible? Thanks, Vishrov for bringing up Mediation in this space and I totally hear where Bitika, Namrata, all of you came from, saying where is the incentive. I'm sure if this panel is aware; so, I won't get into it that. There has been a drive for about now 15 years to try to train support and give support to energy regulators. Has it worked? I can't speak to that; that's what you'll speak to. However, as a community that realises that it has three different kinds of issues. One is of course the DISCOM, which is you're looking for really understanding what the DISCOMs ability is to engage with you. The second is *inter se* between suppliers. And the third is probably calculation or other complicated issues. I know that it is not our job probably, but in these kinds of issues, especially in the power sector, because I've been before APTEL and realized where this gap is, do you think there is scope right now for the renewables as well as the old energy sector, which seems more tired than even this panel, to come together to start engaging the regulatory and the Ministry, both, with constructive suggestions? Because you know exactly where Mediation will work or Med-Arb-Med will work. Have we done that? I mean, it's a very broad question for five people, but it's a thought. It's just a question to understand where are we going with this; otherwise, it's been the same conversation. It takes ten years, the last solar matter that we did we took ten years and it's gone back because the rates changed. So, the goalpost keeps moving. Sometimes we have to fix this ourselves. I know we're looking up but has the regulatory forum ever looked at this big question for five people I'm asking where are the suggestions.

VISHROV MUKERJEE: You know, I just I if you want to answer it first then and I'll...

SUNEI KAPUR: Short answer is, we would love to do it. This... very short answer is we would love to do it provided the Commissions and the Ministries are ready to listen.

VISHROV MUKERJEE: So, you know, I said there is a mismatch. Normally Mediation works where you have two commercially oriented Parties who want to reach a particular end point. Here more often than not the disputes, one of the Parties to the dispute does not really care about the end point because it's not money out of his pocket. Whether he's paying you ₹100 today or he's paying you ₹500 ten years down the line, he's not going to pay for it; it's going to eventually come from the consumer. So, you know that account... till you don't instil that accountability within the system, you, Mediation no matter how mandatory you make it,

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it's not going to serve the purpose. What it is going to do is it is just going to delay the eventual dispute down the road. So, that is something to bear in mind. It's something that is, you know, very specific to the power sector given how DISCOMs operate. It's not going to work unless you make unless you make the DISCOM actually accountable for the additional interest that they're paying or the carrying costs that they're paying, Mediation or any sort of alternate dispute resolution mechanism is unlikely to... informal alternate dispute resolution mechanism is unlikely to succeed.

Anyone else, if they want to say? No. Any other questions? Otherwise, we can sort of wrap it up well within time. Thank you. So, once again, you know, thank you to the MCIA team, thank you to the audience who've listened to this patiently and for all of you who've come out despite today literally being a holiday in Delhi. Thank you for your time. I hope you've managed to take something away from this discussion. And a special thank you to my panellists. I think I've railroaded some of them into this particular panel, but they were gracious enough to bear with me and be a part of this. Thank you very much for this discussion. Thank you.

BITIKA KAUR: Thank you.

ALISHA SHARMA: Thank you, Mr. Mukherjee, and thank you to our distinguished panel for such an illuminating exchange. As the energy transition accelerates, it's clear that arbitration will have an increasingly vital role to play in navigating the risks that come with it. I would request the panel to kindly stay back for a group picture. We shall now head for a lunch break, graciously hosted by Singhania & Partners. We will resume at 3 o' clock. Thank you.

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